

## DECISION

### TALBOT COUNTY BOARD OF APPEALS

#### Appeal No. 20 -1717

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals (the Board) by telephonic means beginning at 6:30 p.m. on December 21, 2020 on the Application of **Skipton Heritage LLC** (the Applicant). The Applicant is requesting a critical area variance to permit the demolition of a single story structure situated within the Shoreline Development Buffer forty six feet (46') from mean high water (MHW), and to permit the construction of a two (2) story 1,349 square foot (sq. ft.) dwelling in the same location; on a footprint twelve (12) sq. ft. smaller in size than the existing dwelling's footprint. The property is located at 12812 Ocean Gateway, Queen Anne, MD 21657 and is located in the Rural Conservation Agricultural Conservation (RC/AC) Zones. The property owner is Skipton Heritage LLC.

Mr. Miguel Salinas, Assistant Planning Officer initiated a roll call of those present telephonically. For the Board of Appeals, the following were present: Phillip Jones, Chairman, Frank Cavanaugh, Vice Chairman; members Louis Dorsey, Jr., Paul Shortall, and Zakary A. Krebeck and alternate member Patrick Beard. Anne C. Ogletree, attorney for the Board of Appeals was also present. Mr. Salinas then identified the representatives of the Applicant who were telephonically present for the hearing: Mr. Bruce Armistead, Esq., Armistead, Lee, Rust and Wright, P.A., 114 Bay Street, Building C, Easton, MD 21601, the attorney/agent for the Applicant; Brett Ewing, Lane Engineering, 117 Bay Street, Easton, MD 21601; Mr. Paul Praeger, managing member, 9 Federal Street, Easton, MD 21601; Stephanie Fleishman, Attorney for Mr. Praeger, 9 Federal Street, Easton, MD 21601; Jessica Hanna, Skipton Heritage LLC's property manager, 9 Federal Street, Easton, MD 21601. Mr. Salinas reported that there were no other members of the public on the call.

The Chairman inquired if the Applicant consented to a virtual hearing and received an affirmative response. He asked if all members had visited the site individually and had the members polled individually. He received affirmative responses from each member. The following Board exhibits were then offered and admitted into evidence as indicated:

Exhibit 1. Application for a Critical Area Variance with Attachment A;

Exhibit 2. Tax Map with subject property highlighted;

Exhibit 3. Notice of Public Hearing proposed for Advertising;

Exhibit 4. Newspaper Confirmation;

Exhibit 5. Notice of Public Hearing with list of adjacent Property Owners with Attachment B;

Exhibit 6. Critical Area Variance Standards with Attachment C;

Exhibit 7. Staff Report prepared by Elisa Deflaux, Planner II;

Exhibit 8. Sign Maintenance Agreement;

Exhibit 9. Comments from Critical Area Commission Staff;

Exhibit 10. Authorization letter;

Exhibit 11. Independent Procedures Disclosure and Acknowledgement Form;

Exhibit 12. Aerial Photo;

Exhibit 13. Right of way Easement Liber 560 folio 277;

Exhibit 14. Non-conforming Status letter from Mary Kay Verdrey, Acting Planning Officer;

Exhibit 15. Floor and Elevation Plans;

Exhibit 16. Site Plan dated 08/11/2020, prepared by Lane Engineering.

The Board also accepted Applicant's Exhibit 1, previously sent to all members and counsel

Exhibit 1. Applicant's Response to Staff Report.

Mr. Jones recognized Mr. Armistead, attorney and agent for the Applicant and wished to know how many witnesses he planned to present. Two witnesses, Mr. Ewing and Mr. Prager, were identified and sworn. The Chairman requested that Mr. Armistead proceed with his presentation. Before proceeding Mr. Armistead amended his prior witness list adding that, if necessary, he would also call Jessica Hanna, the property manager to confirm that the sign had been posted for the requisite period. Mr. Jones believed that would not be necessary as he accepted Counsel's proffered statement.

Mr. Armistead gave a thumbnail sketch of the history of the project. The Applicant purchased the property in 2014. He explained that the entire tract is a 383 acre waterfront farm and includes several homes. The property boasts an elegant manor house now undergoing renovation. He opined that it would be spectacular upon completion. Referencing Exhibit 16, the site plan, he pointed out a 2.2 acre tract, now owned by the Applicant, but not a part of the

application. The remainder of the farm is crop and woodland. The majority of the crop land is actively farmed.

The existing dwelling to be demolished is a small waterfront cottage, a Nanticoke rancher-type residence, originally built in 1976 and replaced with the current structure during the 1990s. (Staff Report, Exhibit 7) The LLC plans to demolish the structure, it occupies 1,361 sq. ft., and replace it with a slightly smaller two-story structure occupying 1,348 sq. ft. The two-story structure will have approximate 2,500 sq. ft. of living space. The existing structure is a legal non-conforming structure (Exhibit 14). As such, it could have been replaced 'in kind' without a variance, however, this replacement will not be 'in kind' due to the addition of the second story. He explained that *Code* §190-50.1 permits vertical expansions, a change from prior law, provided the vertical expansion does not increase the footprint of the new structure and does not bring the building closer to MHW. Both of those criteria will be met.

Explaining why the demolition and replacement is necessary, Mr. Armistead mentioned that Mr. Prager plans to use part of the farm as a vineyard, and wishes to attract a world class manager to live on site and actively oversee the entire on site operation. The current structure will not help to attract that caliber of employee. Mr. Prager believes that the replacement structure, shown on Exhibit 15, will serve as an enticement to a prospective employee.

Mr. Armistead noted that the Critical Areas Commission (CAC) had reviewed the application and had no objection, (Exhibit 9). He stated that the Staff Report had raised certain environmental concerns, and that the Applicant had filed a Response which was circulated to the Board members prior to the hearing. (Applicant's Exhibit 1 or the Response). Those concerns raised by staff involve both site location and water quality. He believed the Response addressed both issues raised by the Staff Report.

Counsel stated that the location of the existing structure is a somewhat unique circumstance, as a visual inspection of the property reveals the existing residence is perched on a bluff overlooking the Wye River. Its closest point to MHW is forty-six feet (46'). The Applicant acquired the property and the residence as currently situated. To deny the variance would deprive the owner to the right to a vertical expansion, a right permitted to other property owners in the Critical Area. The current structure existed well prior to the Critical Areas law. Mr. Ewing would confirm that the replacement structure would actually enhance water quality and would not adversely affect fish, wildlife or habitat. Keeping the structure in the same location would also preserve existing farmland, a goal of the County's Comprehensive Plan. The proposed

improvements would occupy a slightly smaller footprint, and even with the vertical expansion, the residence will be modest in size. Mr. Armistead acknowledged some confusion regarding the height of the structure and called Mr. Ewing to clear that up.

Mr. Brett Ewing, Lane Engineering, LLC, 117 Bay Street, Easton, MD 21601 invited the Board to look at the architectural drawings (Exhibit 15). He explained that the elevation at ground level is already six feet seven inches (6'7") and the structure's highest point will be forty feet eleven inches (40'11") from ground level so the actual height of the structure will be approximately thirty-five feet (35') from grade, and thus will conform to zoning regulations. Mr. Ewing confirmed that the site plan accurately showed the property and structures, and that the closest point of the existing structure was located forty-six feet (46') from MHW. The existing structure has a footprint of 1,361 sq. ft. The closest point of the replacement structure will be the same distance from MHW, but will occupy 1,349 sq. ft., a reduction of twelve (12) sq. ft.

Mr. Ewing next discussed an exhibit contained in the Applicant's Response pointing out existing slopes of more than five percent (5 %) and in some cases more than ten percent (10%) to the west of the structure leading down towards the tidal water of the Wye. The current roof system drains to splash blocks located at the terminus of downspouts, and the discharge then flows directly over the steep slope down to the river. The existing system does not comport with the guidelines of modern storm water management.

This project's storm water goal is to slow the velocity of the storm water discharge and allow it either to infiltrate, or to allow it to travel over an area with slopes less than five percent (5%), thus reducing the velocity of the discharge and preventing erosion or sediment discharge into the Wye. Mr. Ewing explained that the current code recommends that there be a system that will allow sheet flow over a minimum of sixty (60) feet. Due to the structure's location this is not possible. Mr. Ewing opined that the system recommended for the site will improve water quality. Referring to the blue markings on the exhibit, Mr. Ewing stated that the plan is to run the discharge into a network of pipes leading to grade emitters. Those devices can be positioned on slopes of less than five percent (5%), and will be discharging into an established vegetative area. The pipes and grade emitters will also slow the velocity of the discharge, making the plan code compliant. The witness confirmed that the proposed storm water plan being described to the Board would be substantially similar to the storm water management plan that will have to be submitted to the Department of Public Works prior to the grant of a building permit.

Mr. Armistead asked if the witness anticipated any large disturbance at the location if the replacement structure was to use the original footprint. Mr. Ewing responded that the currently existing residence was built as a Nanticoke style single story residence. The footer and foundation were not designed to accommodate a two-story structure or the load of a structural second floor. He did not believe that those foundation structures could be enhanced enough to support the second story. He thought the resulting structure, on a compromised foundation, would not pass inspection. He thought the entire foundation structure would have to be replaced.

In summary, Mr. Ewing noted that the Applicant's proposal will reduce the square footage of the replacement structure's footprint. The storm water management plan proposed will negate any adverse effect on the river and on the Chesapeake Bay, and will actually improve water quality.

The Chairman asked the Board members if they had any questions following Mr. Ewing's testimony. Mr. Dorsey had no questions, nor did Mr. Shortall. However, Mr. Krebeck did. He wanted to understand the previous testimony. He inquired if the plan was to remove the entire foundation, or whether some part of it was to be repurposed. Mr. Ewing answered that he believed the plan was to remove what was there as it would not support a two-story structure.

Mr. Krebeck asked about plans for the septic system, as staff mentioned concerns about relocating a structure in the Shoreline Development Buffer (SDB). Mr. Ewing responded that the plan was to tie into the current system, but if that was not permitted by the Health Department, the system would be replaced using a BAT (Best Available Technology) septic system designed to have minimal impact on the environment.

Mr. Cavanaugh stated his main question concerning the use of the existing foundation had been answered. However, he wished to understand why the location of the structure was not going to be moved out of the hundred foot (100') SDB as it was going to be totally demolished.

Mr. Armistead responded that he felt the Response contained in Applicant's Exhibit 1 adequately addressed the issues involved. He noted that several of the scenarios posited for discussion should the variance not be granted resulted in more serious environmental impacts, including septic systems, driveways and potentially other structures impacting forest and farmland on the property. Those impacts would be in conflict with the goals of the Comprehensive Plan.

Mr. Shortall, a farmer, inquired about the grassland area on the right side of the property that could be observed as one entered. He wanted to know if that area was kept in grass due to an agricultural easement, or whether it was simply left in grass for other reasons. Mr. Armistead responded that he was unaware of any agricultural easements affecting the property, but perhaps Mr. Prager could enlighten the Board concerning the grassed area in his testimony.

Mr. Jones commented that he thought Mr. Armistead had taken issue with the comments in the Staff Report suggesting that the proposed project was not recommended as it did not actually improve water quality. He believed Staff was correct in questioning the effect on water quality and pointed out that the language of the *Code* §190-8.1(A)(1) makes it clear that improvement of water quality is **the** desired result. It is a goal that is as important as protecting and preserving farmland. Maintaining the *status quo* is simply not enough. Mr. Armistead respectfully disagreed, but believed the matter to be a moot point, as the proposed storm water improvements would actually improve water quality.

The Applicant's next witness was Mr. Prager, who is the beneficial owner of the property and managing member of the Applicant. Mr. Prager told the Board that he had been looking at real estate in this area, and when halfway down the driveway of this farm, he knew it was 'the farm' that he had to buy. He has always wanted to have a vineyard, and was creating one on the farm.

The main house is a very important structure having been designed by a famous architect, William Lawrence Bottomly. Bottomly built a number of important houses in the Richmond area, but this is the only house he built on Maryland's Eastern Shore. Mr. Prager received a great deal of the information about the main residence from family of the former owners at closing. He related some of the house's history, disclosing that his son had discovered Bottomly's hand drawn plans in a secret cupboard in the living room. The drawings were authenticated, and this is the only recent discovery of a Bottomly house in over a decade. He feels that the house is unique because the front overlooks the land rather than the water as is customary with other homes here on the shore.

The other thing that impressed the witness was the land itself. It rolls and has better quality soil and drainage than his other farm near St. Michaels which is flat and low. To enrich the soils, cover crops have been planted, and other methods of improving the soils have been explored and utilized. The vineyard itself will continue to expand from year to year. The witness explained that he thinks the land is well suited for a vineyard, and believed a good vineyard

would be an asset to the local area. A good wine consultant is a necessary adjunct to that endeavor. The Applicant has hired a well-known consultant, Helen Klepplinger, to oversee the creation of the vineyard. She reviews the progress with a site visit every month or so. Establishing a vineyard requires a lot of patience, and a lot of capital.

Mr. Prager clarified that the other key person he is now looking for would be an experienced vineyard manager, someone who will supervise employees and be out in the vineyard assessing the health of the crop and making necessary adjustments every day. That person will report to Helen and to Mr. Prager. The witness stressed that he wanted anything that is built on the property to be consistent in style, period and quality so as to compliment the property. The vineyard manager will probably be married, and the existing residence is not built to the standards the witness would like or the standards that would attract a well-versed vineyard manager. He hoped the Board would approve of his plans, and allow the variance.

Mr. Armistead asked if the Board members had questions for Mr. Prager. None did. He then summed up, stating the Applicant would rely on its written answers in its application and the information contained in the Staff Report. He thought the Applicant had met each of the seven criteria for the variance. He suggested that the Board should approve the request.

Mr. Jones asked if either Mr. Salinas or Ms. Deflaux had a comment the Board should consider. Mr. Salinas responded stating that Staff appreciated the Response filed by the Applicant, as it gave the clarification Staff had requested in its report. He added that in light of the CAC approval and the Applicant's Response Staff did not oppose the project but would ask that, if the variance was approved, there be an additional condition. That condition would state that:

Through the Department of Public Works storm water management permit, the Applicant shall construct the storm water management systems as shown on Exhibit A attached to the Applicant's Response to the Staff Report dated December 18, 2020, or shall construct a storm water management system approved by the County Engineer.

Mr. Salinas stated that this proposed condition would implement the testimony given to the Board by Mr. Ewing concerning the reconstruction of the home and address the storm water issues. In the unlikely event that the proposed system did not meet code, the alternative would allow the county engineer to propose changes or other solutions. He asked Mr. Armistead if that condition was acceptable to the Applicant. Mr. Armistead agreed, explaining that the Applicant understood the storm water issue was to be resolved by the methods shown on Exhibit A. Those methods would be part of the actual construction plans. Mr. Jones agreed that the condition



should be added if the variance was approved. He opened the discussion by the Board asking Mr. Cavanaugh for his observations.

Mr. Cavanaugh thought that the plans for the new residence were a substantial improvement over the existing residence. He had been concerned about allowing the structure to be rebuilt within the SDB, but after reading the Response and listening to Mr. Salinas, he thought that he would be satisfied if Staff was also satisfied. Mr. Salinas replied that, given the information contained in the Response, Staff would not oppose the variance. Mr. Cavanaugh felt the request was reasonable, the replacement structure would be an improvement, and the construction plans would take water quality into consideration. He would grant the variance with the four Staff conditions.

Mr. Dorsey commented that he agreed with Mr. Cavanaugh and that he thought it was a reasonable request as well. He believed the Applicant had satisfied all of the variance criteria, and felt that the vertical expansion proposed was the least intrusive, as he understood that the existing foundation would not support a second story. He concurred with the testimony that there would be an improvement in water quality by using the underground piping network and grade emitters to slow down the water velocity and thus prevent erosion and sediment discharge. The proposal would not additionally impact farm or forest land. He was in support of the variance.

Mr. Krebeck first wanted to commend Staff for pointing out that the Applicant needed to demonstrate that there was no other reasonable alternative before recommending or allowing a disturbance in the SDB. He thought the Applicant's Response pointed out the difficulties in moving the house out of the SDB and that also was appropriate. Under these circumstances, because the house exists, moving it out of the SDB may actually increase the environmental impact. If the foundation's structural components allowed, the second story could simply be added, but that is not the case here.

Addressing the water quality issue, he thought the new rooftop and storm water distribution system would certainly help. He noted that the Applicant had not discussed the Buffer Management Plan or the mitigation requirements but both are mentioned in the CAC letter. Both will also improve water quality. Those mitigation requirements and the smaller footprint address the water quality impacts. For all of those reasons he can support the variance.

Mr. Shortall agreed with his fellow Board members. In regard to the Buffer Maintenance Plan, additional plantings along the bank should be considered. As a farmer he is not permitted to disturb earth at the top of the bank, but is required to plant a grass strip along the edge that is not



to be disturbed. He thought the bank had been “cleaned off” at some point in the past, and that it should be restored to its natural state. With that addition, he could support the request.

The Chairman agreed with his colleagues, and specifically with the comments made by Mr. Shortall. Whatever mitigation is required should address the most sensitive area, the bank near the house. Here Mr. Prager has proposed a beautiful structure going above and beyond to enhance the property. Mr. Jones hoped that the same care and attention would be directed to the landscaping and mitigation plantings in the vicinity of the house where there will be run off from the structure. He agreed with the Staff and CAC analysis and commended them for a great job.

#### Statement of Facts and Conclusions of Law

Having considered the *Code*, the Application and the testimony presented, the Board makes the following findings of fact and conclusions of law:

1. The Applicant has submitted a written application for a Critical Area Variance to permit demolition of an existing structure (1,361 sq. ft) within forty-six feet (46') of MHW and permit a two-story replacement structure to be built on a slightly smaller footprint (1,348 sq. ft.) in the same location. Exhibit 1
2. The public hearing was properly advertised, the property was posted, and the adjacent land owners were properly notified. Exhibits 2, 3, 4, 5, 6 and 8.
3. The property in question a 383 acre waterfront farm on the headwaters of the Wye River. The residence to be demolished is a single-story Nanticoke style rancher. It is located forty-six feet (46') from MHW at the top of a bank. The slope of the bank varies from five percent (5%) to ten percent (10%). There is evidence of erosion from run off. Exhibit 12, 16.
4. The existing dwelling is a valid non-conforming structure, and is eligible for replacement “in kind”, however, that avenue is not available to the Applicant as the Applicant wishes to add a second story. That addition prevents the replacement from being “in kind” although it will be permitted as a vertical expansion provided a variance is granted. Exhibit 14.

5. The replacement structure will need a redesigned foundation as the existing foundation's structure will not be adequate to support the new second story.
6. The Staff Report, Exhibit 7, identified two issues for additional clarification: 1) the location of the replacement structure; and 2) the issue of water quality.
7. The Applicant has responded with additional clarification on both issues: 1) relocating the structure outside the SDB will have an adverse environmental impact on both farmland and forest since additional land would be removed from production or forest. If land would be cleared, forest would be destroyed. Additional man-made impacts such as driveways, septic systems and drain fields may be required; 2) a new drainage system will use a network of underground pipes connected to grade emitters to slow the velocity of water discharge thus allowing stormwater to infiltrate or allowing it to drain slowly into an existing vegetated area on a portion of the bank with slopes of less than five percent (5%). Applicant's Exhibit 1 with attachment A.
8. The existing structure is non-conforming, having originally been built in 1976 prior to the enactment of the Critical Areas law.
9. A vertical expansion of a non-conforming structure within the SDB is permitted by *Code* §190-50.1 (B), provided the three conditions are met. In the instant case, the new structure will be no closer to MHW; the footprint will reduce lot coverage by twelve feet; and the other requirements of Chapter 190 are met.
10. The need for the variance is not self-created. The Applicant purchased the property as it now exists. The non-conforming structure antedates the Applicant's purchase.
11. The reason for the variance is to allow the Applicant to demolish the existing rancher and to expand the replacement structure into a two-story residence by adding a second story. The need for the variance is to replace an aging structure with a new modern two-story structure on a

slightly smaller footprint in the hope of attracting a world class vineyard manager to supervise the wine producing operation on the property.

12. A literal interpretation of the ordinance would prevent the Applicant from obtaining a vertical expansion for a structure built on an existing although slightly smaller footprint. Vertical Expansion is a right that is shared by all other lot owners in the SDB if the three conditions are met.
13. The grant of the variance will not confer a special privilege on the Applicant, as the Applicant has the same rights as the lot owners of other non-conforming structures located within the SDB. *See, Code 190-50.1(B)*
14. The grant of the variance allows development on a smaller surface, although the living area will be increased by the addition of a second story. The resulting structure will contain approximately 2,500 sq. ft. of living area, which is a modest increase largely due to the small size of the footprint.
15. The new proposed roof drainage system will actually improve water quality, as the existing discharge from the roof and downspouts cannot be slowed down efficiently to lower the velocity of the discharge. The Applicant proposes to add a discharge system consisting of a network of underground pipes leading to grade emitters that will discharge water at a much slower velocity over slopes that are not as steep, thus preventing sediment and erosion debris from entering the Wye. This improvement will be beneficial to fish and wildlife habitat.

For the reasons set out in the Board's findings, Mr. Dorsey made a motion to approve the requested variance subject to five conditions:

1. The Applicant shall make an application to the Office of Permits and Inspections, and follow all rules, procedures and construction timelines regarding new construction.
2. If necessary, the Applicant shall provide a Buffer Management Plan to mitigate for the variance and any tree impacts associated with the project.

3. The Applicant shall commence construction of the proposed improvements within eighteen (18) months of the Board of Appeals approval.
4. Along with the building permit application, the property owner shall provide sufficient documentation that the house will be inhabited by a full time tenant labor or a member of the immediate family, consistent with *Code* § 190-33.7
5. Through the Department of Public Works storm water management permit, the Applicant shall construct the storm water management systems as shown on Exhibit A attached to the Applicant's Response to the Staff Report dated December 18, 2020,

Mr. Shortall seconded the motion. Mr. Salinas asked if Mr. Dorsey would accept an amendment. In the unlikely event that the system proposed would not meet with the approval of the County Engineer, or it changes were suggested he felt the condition should provide for that contingency. He suggested that it read "or as approved by the County Engineer". Both Mr. Dorsey and Mr. Shortall were comfortable with the suggested amendment so that condition 5 will read:

Through the Department of Public Works storm water management permit, the Applicant shall construct the storm water management systems as shown on Exhibit A attached to the Applicant's Response to the Staff Report dated December 18, 2020, or shall construct a storm water management system approved by the County Engineer.

Mr. Cavanaugh asked if the motion included both all the staff conditions and the plantings suggested by Mr. Shortall. The Chairman replied that the plantings would not be included unless incorporated in a motion. He asked if Mr. Cavanaugh was suggesting an additional amendment. Mr. Cavanaugh replied that he was. Mr. Armistead suggested that the Board require that the Buffer Management Plan include plantings along the bank. Both Mr. Dorsey and Mr. Cavanaugh accepted that amendment so that the motion before the Board included amended condition 5, previously accepted, *supra*, and amended condition 2, as follows:

2. The Applicant shall provide a Buffer Management Plan to mitigate for the variance and any tree impacts associated with the project. The Plan shall include plantings along the top of the bank to assist with storm water management.


There being no further discussion, the Chairman called for each member to vote individually. Mr. Salinas called the role. The motion passed with a vote of five in favor, zero opposed


HAVING MADE THE FOREGOING FINDINGS OF FACT AND LAW, IT IS, BY THE TALBOT COUNTY BOARD OF APPEALS, ORDERED THAT THE VARIANCE BE GRANTED

GIVEN OVER OUR HANDS, this 17TH day of March, 2021.

**TALBOT COUNTY BOARD OF APPEALS**

  
Phillip Jones, Chairman

  
Frank Cavanaugh, Vice-Chairman

  
Louis Dorsey, Jr., Member

  
Paul Shortall, Member

  
Zakary Krebeck, Member